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NO. 08-267

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner,*
v.

JACOB DENEDO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Under 28 U.S.C. § 1259(4)—the jurisdictional statute which the government has invoked—the Court may review "[c]ases . . . in which the Court of Appeals for the Armed Forces has granted relief." Does the Court have jurisdiction under that provision where the Court of Appeals remands to a lower court for further proceedings to "determine whether the requested relief should be granted"?

2. May the military appellate courts issue a writ of error coram nobis where the claim arises after a conviction has become final and no other remedy is available?

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BRIEF FOR THE RESPONDENT

JURISDICTION

The Court lacks jurisdiction. *See* pp. 6-13 *infra*.

GOVERNING STATUTES

The pertinent statutes are reproduced in the appendix to the government's brief.

STATEMENT OF THE CASE

Jacob Denedo, a Nigerian who came to the United States as a student and eventually became a permanent resident, enlisted in the United States Navy in 1989. After two reenlistments, he was convicted in 1998 by a special court-martial for larceny and conspiracy to commit larceny. He was sentenced to three months' confinement, reduction to the lowest enlisted pay grade, and a bad-conduct discharge. He had pleaded guilty in reliance on the explicit (and flatly incorrect) assurance of his civilian defense counsel, Michael A. Ceballos, that conviction by a special court-martial would not expose him to any risk of deportation because conviction by such a court—unlike conviction by a general court-martial—is a federal misdemeanor. The Navy-Marine Corps Court of Criminal Appeals ("the Navy Court") affirmed on February 24, 2000, and on May 30, 2000, Mr. Denedo was discharged.

Mr. Denedo applied for naturalization in 2002. The Immigration and Naturalization Service ("INS") denied his application without prejudice on the

ground that his conviction reflected a lack of good moral character during the statutorily-prescribed period. The INS again denied his application without prejudice when he reapplied the following year.

On October 30, 2006, after expiration of the latest possible date for seeking collateral review of his conviction in a district court or the Court of Federal Claims, 28 U.S.C. §§ 2401(a), 2501, the INS's successor agency (U.S. Citizenship and Immigration Services) did precisely what Mr. Ceballos assured Mr. Denedo the government could not do—it initiated removal proceedings based on the court-martial. The notice to appear treated the court-martial conviction as an "aggravated felony" under the Immigration and Nationality Act ("INA"). 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

In addition to having advised Mr. Denedo that conviction by a special court-martial would constitute a misdemeanor (and hence could not be used to deport him), Mr. Ceballos never informed him that the 1996 INA amendments had expanded the definition of "aggravated felony." Those amendments reduced the minimum term of imprisonment for theft offenses from "at least five years" to "at least one year" and reduced the minimum amount of loss in fraud cases under § 1101(a)(43)(M) from "$200,000" to "$10,000."[1] *See* Pub. L. No. 104-208, 110 Stat. 3009 (1996), *amending* 8 U.S.C. §§ 1101(a)(43)(G), (M). Having no independent knowledge of the term "aggravated felony" or the INA and its amendments, Mr. Denedo relied on Mr. Ceballos to inform him as

[1] The larceny to which Mr. Denedo pleaded guilty involved a loss in excess of $10,000.

to the state of the law and the consequences of his plea.

Upon receiving notice of the removal proceedings, Mr. Denedo secured other counsel and applied for a writ of error coram nobis from the Navy Court, seeking an order setting aside his plea. The Navy Court denied a government motion to dismiss for lack of jurisdiction, but, without explanation, denied relief on the merits. Pet. 63a.

Mr. Denedo filed a timely writ appeal with the Court of Appeals for the Armed Forces.[2] After receiving briefs, the court directed the parties to focus on jurisdiction and, assuming jurisdiction, "whether this Court is in a position to address the merits of the petition without further fact-finding." Hearing Notice, June 26, 2007. The government took the position that the Court of Appeals lacked jurisdiction and that Mr. Ceballos was not ineffective because his advice was correct. When questioned about the inconsistency between its position and that of the Department of Homeland Security ("DHS") in the removal proceeding, the government represented to the Court of Appeals that the United States had abandoned conviction of an aggravated felony as a basis for Mr. Denedo's removal. When DHS announced in the removal proceeding that it had not done so and had no intention of doing so, the government withdrew its claim that "the court-martial charges in this case did not constitute aggravated

[2] A writ appeal is the procedure for seeking review of a decision of a service court of criminal appeals on petitions for extraordinary relief. C.A.A.F.R. 4(b)(2). The Court of Appeals encourages recourse to the service courts in the first instance. C.A.A.F.R. 4(b)(1), 10 U.S.C. § 944.

felonies for immigration law and deportation purposes." Gov't Motion for Leave to Withdraw Certain Arguments at 1 (Jan. 7, 2008).

The government never rebutted the facts set forth in Mr. Denedo's petition, and conceded that his assertions will be taken as accurate for the purpose of review by the Court of Appeals. Gov't Ans. at 2-3 (Apr. 9, 2007); *cf.* C.A.A.F.R. 28(b)(1) ("To the extent that the petitioner's statement of facts is not contested by the respondent, it shall be taken by the Court as representing an accurate declaration of the basis on which relief is sought").

The Court of Appeals held that it had jurisdiction, but rather than grant the relief Mr. Denedo sought, it remanded for further proceedings. Pet. 32a. "If prejudice is found," Chief Judge Effron wrote for the majority, "the [Navy C]ourt shall determine whether the requested relief should be granted." *Id.* Two judges dissented. Pet. 32a, 40a. Judge Stucky "consider[ed] it established that we have coram nobis jurisdiction in cases in which the jurisdiction of the court-martial is at issue," but found it unnecessary to decide the scope of that jurisdiction because, in his view, Mr. Denedo had not made out a claim for relief on the merits. Pet. 32a, 35a. Judge Ryan opined that the Court of Appeals had no jurisdiction and argued that since Mr. Denedo was no longer in the service he could not be retried if coram nobis were granted and his plea set aside. Pet. 40a, 43a-45a.

Without objection from DHS, the Immigration Court administratively closed the removal proceedings on October 17, 2008. Mr. Denedo remains sub-

ject to deportation. He has long since served his sentence.

Unbeknownst to Mr. Denedo, Mr. Ceballos had begun to suffer from the effects of alcohol abuse, including occupational impairment, and agreed to participate in an alcohol rehabilitation program. Even though he failed to stay sober, he continued to practice until May 2000, when he entered a conditional guilty plea in response to bar complaints. He admitted violating the Florida Rules of Professional Conduct by, among other things, failing to adequately advise clients. Later that year, he was suspended from practice for 30 days and placed on probation for two years with alcohol rehabilitation treatment. His parents had him involuntarily committed in November 2000 because his "extreme consumption of alcohol made him a danger to himself and others." In 2001, he was suspended on an interim basis, *Florida Bar v. Ceballos*, 786 So. 2d 1190 (Fla. 2001), and placed on inactive status. *Florida Bar v. Ceballos*, 791 So.2d 1102 (Fla. 2001). In 2002, he was indefinitely suspended. *Florida Bar v. Ceballos*, 832 So. 2d 106 (Fla. 2002). He received reciprocal discipline in other jurisdictions. *E.g., In re Ceballos*, 797 A.2d 1258 (D.C. 2002). Florida reinstated him on three years' probation shortly after the government sought certiorari. *Florida Bar v. Ceballos*, 992 So.2d 821, 2008 WL 4191941 (Fla. 2008). Mr. Denedo was unaware of either Mr. Ceballos's impairment or his unprofessional conduct until after the INS initiated removal proceedings.

The gravamen of Mr. Denedo's claim is that incorrect legal advice rendered his plea involuntary. Because he did not learn of Mr. Ceballos's blunder

until the six-year statutes of limitation for collateral review in the civilian federal courts had expired, he has never had a remedy other than a writ of error coram nobis from the appellate military courts.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction because the Court of Appeals did not "grant[] relief" as required by 28 U.S.C. § 1259(4). If the Court determines that it has jurisdiction, it should affirm because Mr. Denedo's petition meets the threshold requirements for a writ of error coram nobis and Article 76 of the UCMJ does not bar the appellate military courts from entertaining collateral attacks in cases that have become final.

ARGUMENT

I. The Court Lacks Jurisdiction

The government relies on § 1259(4) as the basis for this Court's jurisdiction. That provision authorizes the Court to review "[c]ases, other than those described in paragraphs (1), (2), and (3) of [§ 1259], in which the Court of Appeals for the Armed Forces has granted relief." This is not such a case because the Court of Appeals did not "grant[] relief." Section 1259(4) must be construed with particular precision and fidelity to its terms because it concerns review by this Court. *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 581 (1982). Doing so requires dismissal of the petition as improvidently granted.

"Each of [§ 1259's] four subdivisions makes clear that Supreme Court review is available if, but only if, the Court of Appeals for the Armed Forces decides a case on its merits, either on a mandatory or discretionary basis." EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 128 (9th ed. 2007). "Thus, the Court cannot grant certiorari to review a nonfinal judgment of the Armed Forces court, or an appeal from a lower military court judgment that has just been lodged in the Armed Forces court." *Id.* at 130. The judgment below is plainly nonfinal.

The government's brief (2) describes the decision below as having "affirmed in part, reversed in part, and remanded for an evidentiary hearing." The implication that the Court of Appeals "granted relief" within the meaning of § 1259(4) is unfounded because all it did was remand. It could not be clearer that the merits of Mr. Denedo's request to have his plea set aside remained to be adjudicated:

> [W]e remand Appellant's petition to the United States Navy-Marine Corps Court of Criminal Appeals for further proceedings, where the Government will have the opportunity to obtain affidavits from defense counsel and submit such other matter as the court deems pertinent. The Court of Criminal Appeals will then determine whether the merits of Appellant's petition can be resolved on the basis of the written submissions, or whether a factfinding hearing is required under *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). The court will determine

> whether Appellant's counsel rendered deficient performance and, if so, whether such deficiency prejudiced Appellant under *Strickland v. Washington*, 466 U.S. 668 (1984). *If prejudice is found, the court shall determine whether the requested relief should be granted*.

Pet. 32a (emphasis added).

A remand is not "relief" unless it provides something of substance from the standpoint of the moving party's underlying claim. It is merely a procedural step that may lead to a victory on the merits. "Relief" is the substance of what a moving party seeks and what the court finds he or she is entitled to. *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 706 (7th Cir. 1999) (Posner, C.J.); *cf., e.g., Sullivan v. Hudson*, 490 U.S. 877, 887 (1989) (claimant is not prevailing party under Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), until result of remand to agency is known); *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 791-93 (1989) (plaintiff must achieve some relief on merits of claim to be prevailing party under 42 U.S.C. § 1988); *Watson v. Southeastern Pennsylvania Transp. Auth.*, 207 F.3d 207, 224 (3d Cir. 2000) (reinstatement was "relief" for purpose of awarding fees because it was a benefit sought in suing); *Cady v. City of Chicago*, 43 F.3d 326, 328 (7th Cir. 1994) (outcome of civil rights suit is "relief" only if actual relief on merits materially affects behavior of defendant in way that directly benefits plaintiff). "A boxer thrown out of the ring and then allowed back in to continue the fight has not prevailed." *Akers v. Nicholson*, 409 F.3d 1356, 1360 (Fed. Cir. 2005).

"Relief" is a term of art whose meaning is derived from the context. The context of § 1259(4) is petitions for extraordinary relief in the nature of various prerogative writs, as opposed to the three more conventional ways by which a case can reach the Court of Appeals (mandatory review, certification by the Judge Advocate General, and petition for a grant of review). Setting aside a plea is quintessential coram nobis relief. *E.g.*, *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) (erroneous advice on immigration consequences of guilty plea); *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002) (same); *see generally* 39 Am. Jur. 2d *Habeas Corpus* § 271, at 423 (1999) ("If the triumphant coram nobis petitioner has served the sentence and is no longer incarcerated, the conviction is vacated and the petitioner's record of conviction expunged"). In the rare coram nobis case in which the Court of Appeals does grant relief, its order is unambiguous. *E.g.*, *Del Prado v. United States*, 23 U.S.C.M.A. 132, 48 C.M.R. 748, 750 (1974) (declaring conviction null and void, directing expungement and restoration of rights and privileges).

In its reply brief at the certiorari stage, the government argued (3), first, that remand is "a traditional and important form of relief for a party that lost in a lower court" and, second, that it was the only relief the Court of Appeals could have granted. *Lonchar v. Thomas*, 517 U.S. 314, 332 (1996), on which the government relied for the first point, does not define a remand as "relief," but merely recites that a new trial or resentencing is traditional habeas

relief. This is not a habeas case and, in any event, the Court of Appeals did not order a new trial.[3]

Nor is the government's second point well taken. In the Navy Court, it elected to move to dismiss on jurisdictional grounds, rather than attempting to rebut Mr. Denedo's evidence of ineffective assistance. Having first directed the parties to focus on whether further proceedings were needed before it addressed the merits, the Court of Appeals explained that "it would be inappropriate to render a judgment on the merits" because the lower court had not afforded the government an opportunity to obtain affidavits and submit any other matters that might have a bearing on the merits. Pet. 31a. The fact that this particular case unfolded as it did says nothing about the meaning of the term "relief" in § 1259(4). Had the Navy Court required the government to lay its evidentiary cards on the table and then denied Mr. Denedo's petition, there is no doubt the Court of Appeals could have granted relief on the merits.[4]

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[3] At the certiorari stage, the government also asserted (3) that, by requesting an order "setting aside his guilty plea and grant[ing] such other and further relief as in the circumstances justice may require," Mr. Denedo acknowledged that "relief" can embrace a variety of remedies. The point is without merit as the boilerplate clause referred to is surplusage. *Sharp v. Weinberger*, 798 F.2d 1521, 1524 (D.C. Cir. 1986) (request for "all other relief deemed just and proper" was surplusage); *Crane v. United States*, 41 Fed. Cl. 338, 340 (1998) (request for "such other and further relief this Court deems just and proper" was no more than "standard procedural phrase").

[4] Apart from the transparently inapposite *per curiam* in *Calderon v. Moore*, 518 U.S. 149 (1996) (discussing mootness rather than jurisdiction), the only other authority the government invoked for its claim that a bare remand is "relief"—

The Court of Appeals neither granted relief, nor found Mr. Denedo entitled to it, nor directed the Navy Court to do either of those things. While the "further proceedings" it directed on remand could yield relief from the conviction, that outcome is anything but preordained. Because, as the Court of Appeals itself recognized, relief may be denied, Pet. 32a, it cannot be said to have already "granted relief."

Because most extraordinary writ petitions are filed by the accused, rather than the government, the constraint imposed by § 1259(4)'s "relief" clause operates overwhelmingly to the accused's detriment and the government's benefit. Whether that asymmetry is wise or unwise is not for the Court to determine. It certainly does not lie in the government's mouth to complain about its effect, as it was drafted by the Defense Department. *See* Letter from William H. Taft IV, Gen. Counsel, Dep't of Defense, to Speaker Thomas P. O'Neill, Jr., Aug. 12, 1982, in U.S. Army Legal Svcs. Agency Law Lib. & Gov't App. Div., Legislative History of the Military Justice Act of 1983, 173, 199-200 (1984-85) (transmitting original version of § 1259); *see also id.* at 257, *The Military Justice Act of 1982, Hearings on S. 2521 Before the Subcomm. on Manpower & Personnel, Sen. Comm. on Armed Services,* 97th Cong. 2d Sess. 20 (1982) (noting that Supreme Court review provision

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United States v. Ginn, 47 M.J. 236, 238 (C.A.A.F. 1997)—is a snippet from which it infers that a remand is "relief" because the Court of Appeals used the term "other." This is a slender reed on which to predicate this Court's exercise of jurisdiction in light of the manifest congressional intent. *See* note 3 *supra*.

was in Dep't of Defense proposal but not in Senate bill).

Section 1259 must be read as a whole. Its four paragraphs carefully distinguish between extraordinary writ cases and cases arising on direct review. In the largest category—cases arising on petition for grant of review—Congress limited the certiorari jurisdiction to those in which the Court of Appeals "granted . . . *review*" (§ 1259(3)), whereas § 1259(4) requires that the Court of Appeals have "granted *relief*" (emphases added). The different terms Congress employed cannot be ignored. "This Court presumes that, where words differ . . . , Congress has acted intentionally and purposely." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 54 (2006).

Section 1259(4) must also be understood in light of other aspects of the Court's congressionally-determined appellate jurisdiction. *See* U.S. Const. art. III, § 2, cl. 2. There is a sharp contrast between certiorari jurisdiction over decisions of the Article III courts of appeals and certiorari jurisdiction over decisions of the Court of Appeals for the Armed Forces. Section 1254(1) grants jurisdiction "before or after rendition of judgment or decree." Section 1259(4) is fundamentally different. It does not permit certiorari before judgment. *See* SUPREME COURT PRACTICE, *supra*, at 128, 130. The textual difference between §§ 1254(1) and 1259 reflects a heightened congressional concern that the military appellate process run its course before certiorari becomes available.

Because the Court lacks jurisdiction, the petition should be dismissed as improvidently granted.[5]

II. Mr. Denedo's Petition for a Writ of Error Coram Nobis is "[N]ecessary or [A]ppropriate in [A]id of" the Jurisdiction of the Appellate Military Courts

For nearly half a century, appellate military courts have entertained collateral challenges to court-martial convictions.[6] Doing so has been en-

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[5] It is of no moment from the standpoint of this Court's jurisdiction that, if the military courts in the end deny the relief Mr. Denedo seeks, examination of the Court of Appeals' coram nobis authority will have to await some future case. If, following the proceedings on remand, his plea is set aside by the Navy Court, nothing will prevent the government from seeking this Court's review of the Court of Appeals' earlier assertion of jurisdiction. This is so because the Judge Advocate General can certify the case to the Court of Appeals, Art. 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2); *United States v. Curtin*, 44 M.J. 439, 440 (C.A.A.F. 1996); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981); C.A.A.F.R. 4(a)(2), and that would render it eligible for review under § 1259(2).

[6] *E.g.*, *Thompson v. United States*, 60 M.J. 880 (N.-M. Ct. Crim. App. 2005); *Seelke v. United States*, 21 U.S.C.M.A. 299, 45 C.M.R. 73 (1972); *Maze v. U.S. Army Court of Military Review*, 20 U.S.C.M.A. 599, 44 C.M.R. 29 (1971); *Coleman v. United States*, 21 U.S.C.M.A. 171, 44 C.M.R. 225 (1971); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966) (appellate military courts can issue writs of error coram nobis after final judgment); *In re Taylor*, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961); *United States v Tavares*, 10 U.S.C.M.A. 282, 283, 27 C.M.R. 356, 357 (1959) (assuming without deciding that court has jurisdiction to issue writ of error coram nobis after final judgment); *United States v. Buck*, 9 U.S.C.M.A. 290, 293, 26 C.M.R. 70, 73 (1958) (assuming without deciding that Court of Military Appeals (Court of Appeals' predecessor) has juris-

tirely proper, and the government's effort to disable this key element of appellate military justice is mistaken and should be rejected. The decision below correctly asserts jurisdiction to entertain a coram nobis petition consistent with the "highly constrained standards" applicable to it. Pet. 10a, 22a. To deny the appellate military courts power to grant that essential, albeit rarely warranted, collateral remedy would be to deny their judicial character, thwart the overall congressional plan, and turn those courts into mere spectators helpless to remedy injustice such as that suffered by Mr. Denedo. The government's position seeks to overturn precedent needlessly, proves too much, and leads to unjust results.

A. *Mr. Denedo's petition is in aid of the jurisdiction of the appellate military courts*

Before a court may exercise All Writs Act power, it must have subject matter jurisdiction, since that statute only permits writs that are "in aid of" jurisdiction. The writ Mr. Denedo sought qualified because his case had been reviewed and affirmed by the Navy Court. That court was required to review the case because his sentence included a bad-conduct discharge. Art. 66(b), UCMJ, 10 U.S.C. § 866(b). The Court of Appeals, in turn, has jurisdiction to review

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diction to issue extraordinary relief after final judgment in extraordinary circumstances); *United States v. Ferguson*, 5 U.S.C.M.A. 68, 86-87, 17 C.M.R. 68, 86-87 (1954) (Brosman, J. concurring); *United States v. Best*, 4 U.S.C.M.A. 581, 585, 16 C.M.R. 155, 159 (1954) ("wide variety of action is available to an appellate court to protect and preserve the integrity of a trial," citing All Writs Act, 28 U.S.C. § 1651(a), and *United States v. Morgan*, 346 U.S. 502 (1954)).

decisions of the Navy Court. Art. 67(a), UCMJ, 10 U.S.C. § 867(a).

When a petitioner seeks collateral relief to modify an action taken within the subject matter jurisdiction of the military justice system (here, the findings or sentence of a court-martial), a writ that is necessary or appropriate may be issued "in aid of" the court's existing jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). The exercise of such power after final judgment, as the Court of Appeals acknowledged, is governed by "highly constrained standards" and only available in "very limited circumstances." Pet. 10a, 22a (citing *Morgan*, 346 U.S. at 511). Mr. Denedo's petition meets those standards.

1. The Court of Appeals' decision is consistent with Goldsmith

Far from conflicting with *Goldsmith*, as the government contends (13), the decision below finds support in that case. Major Goldsmith did not challenge the findings or sentence of his court-martial. Rather, he sought extraordinary relief with respect to an order dropping him from the rolls. That was an administrative action, not a "finding," "sentence," or punishment "that was (or could have been) imposed in a court-martial proceeding." *Goldsmith,* 526 U.S. at 530; *cf. Parisi v. Davidson*, 405 U.S. 34, 44 (1972) (appellate military courts lack jurisdiction over claim for conscientious objector discharge). "[T]he elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the 'aid' of the All Writs Act in reviewing it." *Goldsmith*, 526 U.S. at 535. As a

result, the Court was entirely right to find that the Court of Appeals had exceeded its authority.

But this case does not concern some mere military administrative action. Mr. Denedo challenges his guilty plea and conviction. This is the very core of the court-martial process. The government admits as much, acknowledging (15) that his claim concerns "a judgment" and issues over which the appellate military courts have cognizance. It merely insists that his claim comes too late and that appellate military jurisdiction vanished when direct appellate review came to an end.

The government's argument rests on a double-barreled misreading of *Goldsmith*. First, it points to the word "existing" in the phrase "existing statutory jurisdiction," *Goldsmith*, 526 U.S. at 535, suggesting that it means an appellate military court only has jurisdiction *during* direct review. Gov't Br. 7, 10, 13-15; *see also id.* 27 (substituting "ongoing" for "existing"). But *Goldsmith* did not employ the term "existing" in a temporal sense. Rather, it used "existing statutory jurisdiction" to emphasize the undisputed point that the All Writs Act is not an independent source of jurisdiction and that the underlying source must originate from or exist within some separate statute.

Second, the government seizes on the sentence in *Goldsmith* that observes that "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review." *Goldsmith*, 526 U.S. at 536. It reads this to mean there is no source of continuing jurisdiction over *any aspect* of final military court

judgments for any reason. Gov't Br. 10 (claiming the Court of Appeals "repeated its mistake from *Goldsmith*, where, this Court held, the CAAF had erroneously asserted 'continuing jurisdiction' *over any judgment* that it 'at one time had the power to review'") (emphasis added).

This distorts *Goldsmith*. When the Court observed that the Court of Appeals has no continuing jurisdiction over *everything* related to military court judgments it was not saying that that court has no continuing jurisdiction over *anything* related to them.[7] Indeed—and this is the proof that *Goldsmith* if anything supports Mr. Denedo's case, rather than harming it—*Goldsmith* itself includes an illustration of how an appellate military court has continuing jurisdiction over a final judgment—*viz.*, All Writs Act power to compel adherence to its judgment. *Goldsmith*, 526 U.S. at 536 (noting government concession and citing, *e.g.*, *United States v. United States Dist. Court for Southern Dist. of N.Y.*, 334 U. S. 258, 263–64 (1948)).

Finally, in *Goldsmith* the Court of Appeals had acted after the case was final. Given that that case concerned the Court of Appeals' own jurisdiction, it is unlikely that this Court would, as Judge Ryan suggested, Pet. 55a n.9, pass over in silence an Article 76 infirmity had there been one. After all, the Court expressly noted that "the approved findings and sen-

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[7] The government's revision of *Goldsmith* is in any event squarely at odds with *Morgan*, 346 U.S. at 511: "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy [coram nobis] only under circumstances compelling such action to achieve justice."

tence in Goldsmith's case had become final," while providing an illustration that contradicts the position the government espouses here. *Goldsmith,* 526 U.S. at 536 & n.9.[8] If Article 76 has the effect attributed to it by the government, then once a case becomes final, no military court could take action either to compel adherence to the judgment or to void a conviction for lack of jurisdiction. Judge Ryan's dissent acknowledges that both of these powers may be exercised notwithstanding Article 76, and does so without reference to any authority in the UCMJ. Pet. 46a-47a. Likewise, *Goldsmith* cites nothing in the UCMJ for the proposition that an appellate military court may grant extraordinary relief in a final case. 526 U.S. at 536. Since the appellate military courts are creatures of statute, the only other basis for these powers can be the All Writs Act. The government's construction of Article 76 is, in addition to its other faults, *see* pp. 38-45 *infra*, at odds with *Goldsmith.*

2. The government's concessions are fatal to its argument

The government contradicts its own claim (10, 14) that an appellate military court has no continuing jurisdiction over a final judgment by admitting (27-29) that there are circumstances in which the All Writs Act can be utilized to "aid" such a court's past

[8] *Goldsmith* indicated that if, rather than simply dropping an officer from the rolls, "a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to the specific provisions of the UCMJ," an appellate military court would have post-finality power to compel adherence to its own judgment. 526 U.S. at 536.

(as well as present or future) jurisdiction. *See Telecommunications Research and Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (All Writs Act can "aid" court's jurisdiction over "past, present, or future" action).

Likewise, all of the judges below—even the dissenters—identified post-finality circumstances in which the All Writs Act may be invoked in aid of the appellate military courts' jurisdiction. Judge Stucky found it unnecessary to determine the scope of that power, but acknowledged that those courts have post-finality power to address "fundamental and inherent problems of jurisdiction" and of course have "jurisdiction to determine" their own jurisdiction. Pet. 34a & n.1. He considered it "established" that the Court of Appeals has coram nobis jurisdiction "in cases in which the jurisdiction of the court-martial is at issue," Pet. 32a, and acknowledged that the appellate military courts may issue post-finality coram nobis relief to correct an "error 'of the most fundamental character.'" Pet. 39a (citing *Morgan*, 346 U.S. at 509 n.15; *United States v. Mayer*, 235 U.S. 55, 69 (1914)).

Judge Ryan agreed with *Goldsmith*'s past-jurisdiction illustration, adding that, "as always, a court may question whether its initial judgment was void in the first instance for want of jurisdiction." Pet. 46a n.2 (citing *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947)). Neither she nor the government make any serious attempt to reconcile the admitted availability of collateral relief after final judgment with their view that the UCMJ precludes relief other than new trial petitions and clemency. The closest the government comes is its claim

(28) that "[a] petition to compel adherence to a final judgment bears no resemblance to the present petition for writ of error coram nobis seeking to alter or overturn that judgment." That claim is wide of the mark. There is no distinction, in terms of jurisdiction, between the collateral relief the government admits is available, on the one hand, and coram nobis, on the other. Writs to compel adherence to a final judgment, to set aside a judgment for want of jurisdiction, or to correct a fundamental error which "rendered the proceeding itself irregular and invalid" are *all* collateral remedies and *all* rest on the same source of past or continuing statutory jurisdiction. The common thread is that these powers, while tightly constrained and available only in extraordinary circumstances, are essential parts of the arsenal of judicial powers that serve to protect and enforce the integrity of final judgments.

The government admits (28) that courts created by Congress have inherent powers that extend past finality. Citing only civil cases, however, it proposes to restrict those powers to the enforcement of judgments. The case they fail to confront is *Morgan*, where the Court applied collateral relief principles in the context of a criminal case and held that

> [c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy [coram nobis] only under circumstances compelling such action to achieve justice.

346 U.S. at 511.

Since the Judiciary Act of 1789, 1 Stat. 73, Congress has recognized that courts cannot function without the power to issue extraordinary writs. The All Writs Act is the successor to § 14 of the Judiciary Act. It "extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts." *Morgan*, 346 U.S. at 506 n.6 (citing Reviser's Note). When Congress enacted the UCMJ and created appellate military courts, it set in motion a complete criminal justice system in which the courts would have these powers. It would be anomalous for an appellate military court to be able to issue extraordinary writs to enforce a final judgment or to set one aside based on a jurisdictional defect but powerless to correct a constitutional or other fundamental error affecting the "'validity and regularity'" of the judgment." *Id.* at 507.

3. The government applies an obsolete standard for the scope of collateral review

Without broadcasting the fact, the government has conceded (27-29) that the appellate military courts have jurisdiction to entertain post-finality petitions for extraordinary relief. The dispute before the Court therefore actually concerns the *scope*, not the *existence*, of that power.

According to the government and Judge Ryan, that power is limited to petitions seeking to enforce a judgment or to declare one void for lack of jurisdiction in the strictest sense. They appear to apply to the appellate military courts the narrow scope of re-

view described for Article III courts in, for example, *In re Grimley*, 137 U.S. 147, 150 (1890)—"[t]he single inquiry, the test, is jurisdiction"—*i.e.*, whether the sentencing court had personal and subject-matter jurisdiction. But that "test" is obsolete. *Johnson v. Zerbst*, 304 U.S. 458 (1938), expanded the scope of jurisdictional challenges by holding that a trial court could lose jurisdiction by failing to provide constitutionally-guaranteed counsel to the defendant. *Id.* at 468 (jurisdiction, though present at the beginning, was "lost" in course of trial by failure to provide counsel for accused). In *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942), the Court broke free of the "jurisdiction" terminology, making clear that collateral review of "the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it." *See also Schlesinger v. Councilman*, 420 U.S. 748, 747 (1975) (otherwise final judgment subject to collateral relief "because of lack of jurisdiction or some other equally fundamental defect"); *Morgan*, 346 U.S. at 512-13 (coram nobis appropriate to remedy denial of Sixth Amendment right to effective assistance of counsel).

4. Toth v. Quarles *is irrelevant*

Invoking *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955), the government argues (29-32) that Mr. Denedo cannot be heard because, having been discharged, he is no longer subject to trial by court-martial. This is simply not so. Embracing this view would upset decades of settled military ju-

risprudence[9] and conflate personal jurisdiction and appellate subject-matter jurisdiction.

At issue in *Toth* was whether the military had jurisdiction to try a former service-member who committed an offense while on active duty but had no relationship with the military at the time of trial. 350 U.S. at 23. The Court held that a court-martial may not try an ex-service-member who had no relationship with the military at the time of trial. This says nothing about the question presented here because the court-martial that convicted Mr. Denedo had jurisdiction over both the person and the alleged offenses. As Chief Judge Effron observed, "[w]hen court-martial jurisdiction has been invoked properly at the time of trial, the jurisdiction of the Court of Criminal Appeals to review the case does not depend on whether a person remains in the armed forces at the time of such review." Pet. 21a (citing *United States v. Davis*, 63 M.J. 171, 176-77 (C.A.A.F. 2006)).

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[9] For example, execution of a punitive discharge "does not deprive the Court [of Appeals] of jurisdiction to grant a petition for review." *United States v. Engle*, 28 M.J. 299 (C.M.A. 1989) (per curiam). Jurisdiction is also unimpaired by the fact that the accused has been released from active duty. *E.g.*, *United States v. Woods*, 26 M.J. 372 (C.M.A. 1988); *United States v. Jackson*, 3 M.J. 153 (C.M.A. 1977); *United States v. Entner*, 15 U.S.C.M.A. 564, 36 C.M.R. 62 (1965); *United States v. Green*, 10 U.S.C.M.A. 561, 28 C.M.R. 127 (1959); *United States v. Speller*, 8 U.S.C.M.A. 363, 368, 24 C.M.R. 173, 178 (1957); *see also Steele v. Van Riper*, 50 M.J. 89 (C.A.A.F. 1999) (administrative discharge during appellate review did not affect power of convening authority or appellate military courts to act on findings and sentence); *United States v. Sippel*, 4 U.S.C.M.A. 50, 52-54, 15 C.M.R. 50, 52-54 (1954) (appellate jurisdiction unaffected by expiration of officer's commission).

The government concedes (31 n.8) that "once court-martial jurisdiction attaches, it continues until the appellate processes are completed." The concession is unavoidable since the government invokes continuing jurisdiction whenever it retries an accused who has been separated before the reversal of his or her conviction. *Davis*, 63 M.J. at 176-77. Military jurisprudence has long recognized that appellate action "reversing the conviction and sentence [does not] prevent petitioner's retrial even though his discharge occurred before the reversal." *Peebles v. Froehlke*, 22 U.S.C.M.A. 266, 268, 46 C.M.R. 266, 268 (1973).

Notwithstanding this, the government proposes to distinguish between those who challenge their conviction on direct review and those who do so on collateral review. There is no basis for such a distinction: a person is either *in* or *out* of the service. When jurisdiction attaches and a conviction has been obtained, the military justice system does not lose jurisdiction as a result of a subsequent change in the accused's status. *Carter v. McClaughry*, 183 U.S. 365, 383 (1902). In *Toth*, jurisdiction did not attach because Toth had not been convicted prior to his discharge.

The fallacy of the government's personal jurisdiction claim is apparent from Rule for Courts-Martial ("R.C.M.") 1210(b). That rule, which is part of the *Manual for Courts-Martial*, provides that "[a] petition for a new trial may be submitted by the accused personally, or by accused's counsel, *regardless whether the accused has been separated from the service*" (emphasis added). A former service-member who has been convicted by court-martial and has

completed direct appellate review may thus be court-martialed again on the original charges if a new trial is ordered. That situation is indistinguishable from cases in which a writ of error coram nobis is issued. Both entail continuing court-martial jurisdiction over former service-members after the completion of direct appellate review. The government's *Toth* argument cannot be accepted without invalidating R.C.M. 1210(b).[10]

B. *Mr. Denedo's petition is "agreeable to the usages and principles of law"*

Coram nobis is a "vehicle for collateral redress of denials of constitutional rights, usually because the traditional procedures for affording such relief are for some reason inadequate." *Morgan*, 346 U.S. at 516 n.5. This is a classic coram nobis case. The writ is necessary and appropriate because Mr. Denedo has no other adequate remedy. The government contends otherwise, suggesting that coram nobis no longer exists, it is ill-suited to or unavailable in the military justice system, and alternative remedies are available. None of these contentions withstands scrutiny.

1. Coram nobis is an available remedy

Citing (32) *Carlisle v. United States*, 517 U.S. 416, 429 (1996), and quoting *United States v. Smith*, 331

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[10] The government's *Toth* argument also proves too much because, if it were valid, the Article III courts and the Court of Federal Claims also could not grant relief in respect of a final court-martial—something the government elsewhere correctly concedes (34-35) they can do.

U.S. 469, 476 n.4 (1947), the government claims that coram nobis is neither necessary nor appropriate because "it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate."

"Difficult" does not mean "impossible." *Carlisle* does not mention *Morgan*, much less overrule it. Nor does rarity of use mean the writ has somehow fallen into desuetude. Rejecting a government argument that 28 U.S.C. § 2255 "should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts," *Morgan* held that coram nobis is available after final judgment and exhaustion or waiver of any statutory right of review in exceptional circumstances. *Morgan*, 346 U.S. at 511. The government's brief never even mentions *Morgan*'s holding or the fact that it specifically characterized the *Smith* footnote quoted above. *Morgan* makes clear that *Smith* was merely "referr[ing] to the *slight need* for a remedy like coram nobis in view of the modern substitutes." *Morgan*, 346 U.S. at 509 n.15 (emphasis added). *Morgan* recognized that, while the occasions for coram nobis relief are "infrequent, no one doubts its availability at common law." *Id.* at 507.[11]

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[11] *See United States v. Kwan*, 407 F.3d 1005 (petitioner satisfied threshold coram nobis requirements and demonstrated that counsel's erroneous advice on immigration consequences of guilty plea was deficient and prejudicial); *United States v. Castro*, 26 F.3d 557, 559-63 (5th Cir. 1994) (petitioner satisfied threshold coram nobis requirements; remanded for ineffective assistance determination on claim that counsel failed to inform him, prior to guilty plea, of opportunity to request judicial recommendation against deportation).

What the government cites (12, 32, 38) as coram nobis's vices—rarity, unsettled scope, and absence of time limits—are actually its virtues. The genius of this gap-filler remedy is that it is available in those rare circumstances when "no other remedy [is] available" and "sound reasons exist[] for failure to seek appropriate earlier relief." *Morgan*, 346 U.S. at 512. In those situations, a request for coram nobis relief must be heard, "[o]therwise a wrong may stand uncorrected which the available remedy would right." *Id.* at 512, 516 n.5; *see also* 2 STEVEN CHILDRESS & MARTHA DAVIS, FEDERAL STANDARDS OF REVIEW § 13.01, at 13-3 (3d ed. 1999) ("if more usual avenues to relief are foreclosed, or if the writ raises 'matters which, if proven, would amount to a denial of a fair trial and which cannot be raised on direct appeal because they are outside the scope of the trial,' coram nobis may be the only recourse to prevent a substantial injustice") (citing *United States v. Taylor*, 648 F.2d 565, 573 n.24 (9th Cir. 1981)).

The government suggests (32) that there is less need for coram nobis in the military justice system than in civilian courts. If anything, the reverse is true because the UCMJ has no analogue to § 2255 or any statutorily defined procedure for collateral review. Rather, Congress conferred rulemaking power on the President, the Judge Advocates General, and the Court of Appeals. Arts. 36, 66(f), 144, UCMJ, 10 U.S.C. §§ 836, 866(f), 944. The parameters of collateral relief under the All Writs Act were left to be determined through the common law process and exercise of those rulemaking powers.

Judge Ryan characterized the resulting procedures for post-conviction fact-finding as "unwieldy

and imperfect," Pet. 47a, but neither she nor the government challenge the legitimacy of those procedures, and the fact remains that the appellate military courts have been employing them successfully to adjudicate post-conviction proceedings for decades. *DuBay*, 37 C.M.R. at 413. The current arrangements—and the decision below—are actually consistent with the government's repeatedly expressed views. *See* pp. 45-56 *infra*.

2. Mr. Denedo has no other adequate remedy

The government insists (32-35) that a writ of error coram nobis is not "necessary or appropriate" because "adequate alternative remedies are available to convicted former service members" like Mr. Denedo. This claim is specious.

Direct review is not an "adequate alternative remedy" because Mr. Denedo did not learn that he had been gravely misadvised until long after the completion of direct review. Nor could he have filed a new trial petition, Art. 73, UCMJ, 10 U.S.C. § 873, because that remedy is unavailable to accuseds who plead guilty, as Mr. Denedo did. *See* R.C.M. 1210(a).[12] Even if that were not the case, a new trial

[12] R.C.M. 1210(a) was amended in 1998 "to clarify its application consistent with interpretations of Fed. R. Crim. P. 33 that newly discovered evidence is never a basis for a new trial of the facts when the accused has pled guilty." R.C.M. 1210(a) (Analysis), *Manual for Courts-Martial, United States* (2008 ed.), at A21-96. "Article 73 authorizes a petition for a new trial of the facts when there has been a trial. When there is a guilty plea, there is no trial." *Id.*; *see* 26 MOORE'S FEDERAL PRACTICE § 633.02[1], 633-7 (3d ed. 1997) ("Rule 33 is only available where

petition would not have been available anyway because Mr. Denedo did not and could not discover the error until after Article 73's two-year deadline had expired.[13]

The government cites (25-26) a brief exchange during the 1949 House hearings on the UCMJ as proof that Congress intended new trial petitions to be the only form of post-conviction collateral attack. Legislative history is not determinative here because the text of Article 76 has a "clear purport." *Schlesinger*, 420 U.S. at 752. In any event, the departmental witness's comments were never developed much less adopted in a committee report. They reflected a superficial and incorrect understanding of the law of new trials and coram nobis. Those remedies serve different purposes and are not fungible. Notably, one who has pleaded guilty cannot file for a new trial, but can seek coram nobis. *See* p. 28 & n.12 *supra*. The legislative history, moreover, is not *res nova*. The Court surveyed it in *Schlesinger*, and concluded that "an affirmative intent to preclude all other forms of collateral relief, on whatever ground, cannot be inferred from these scattered statements in the legislative history." 420 U.S. at 752.

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a trial occurred; the Rule does not make a new trial available to one who pled guilty").

[13] Even though Article 73 is modeled after Fed. R. Crim. P. 33, a non-jurisdictional claims-processing rule, *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam), it contains a statutory time limit that is presumably jurisdictional. *See Bowles v. Russell*, 127 S. Ct. 2360, 2365-66 (2007); *cf. United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009) (held, applying *Bowles*, UCMJ's statutory 60-day period for filing petition for grant of review is jurisdictional).

The government also proposes (33) two collateral remedies within the military justice system as examples of "adequate alternative remedies . . . available to convicted former service members": "a convicted service member may petition the military courts in certain circumstances, *i.e.*, to compel adherence to the final judgment or to challenge the court-martial's jurisdiction." Not only do these remedies necessarily involve continuing jurisdiction after final judgment to entertain petitions for collateral relief within the military justice system (and thus support Mr. Denedo's case), but the second one admits the availability of coram nobis relief, as that is the classic vehicle to impeach a judgment collaterally based on a jurisdictional defect. The government is using obsolete pre-*Johnson v. Zerbst* terminology when it refers to a "petition . . . to challenge the court-martial's jurisdiction." Jurisdictional challenges to a final judgment on collateral attack extend to constitutional defects and other fundamental errors. *See* p. 22 *supra*.

The government also suggests (33-35) that Mr. Denedo can invoke the district courts' federal question jurisdiction or the Court of Federal Claims' Tucker Act jurisdiction. Not so. The applicable six-year statutes of limitation, 28 U.S.C. §§ 2401(a), 2501, expired before removal proceedings were initiated against him and he became aware of the gross error in Mr. Ceballos's advice. *See Walters v. Secretary of Defense*, 725 F.2d 107, 114 (D.C. Cir. 1983) (limitation period begins to run when discharge is final), *reh'g denied*, 737 F.2d 1038 (1984) (en banc) (per curiam); *Martinez v. United States*, 333 F.3d 1295, 1303 & n.2 (Fed. Cir. 2003) (en banc) (collecting cases) (cause of action accrues on date of discharge).

Even if there were a doctrine of equitable tolling, *but see Bowles v. Russell, supra*, Mr. Ceballos was not a government official and his error cannot be imputed to the government.

Under the assumption that all claims against the United States would be time-barred, the government cites (35) *Goldsmith*, 526 U.S. at 539 n.12, for the proposition that "[i]t is enough that respondent's 'constitutional objections *could* have been addressed by the federal courts.'" This reliance on *Goldsmith* is again misplaced. *Goldsmith* observed that, even assuming the Court of Appeals had some basis for jurisdiction to entertain Goldsmith's claim, "resort to the All Writs Act would still be out of bounds" because there are "alternative remedies available to a servicemember demanding to be kept on the rolls." *Id.* at 537. The Court pointed out that Congress had created administrative bodies within the military to review the very sort of agency action about which Goldsmith complained and that federal courts have authority to review agency action, whether or not Goldsmith availed himself of the Board for Correction of Military Records option. *Id.*

There was also no statute of limitations issue in *Goldsmith*. "[T]he Air Force notified Goldsmith in 1996 that it was taking action to drop him from the rolls." *Id.* at 532. By 1999, when the Court observed that his "constitutional objections could have been addressed by the federal courts," he still had three more years in which to sue. An "alternative remedy" therefore was in fact available to review his claim. *Goldsmith* therefore is not authority for the proposition that the past availability of a remedy to correct a constitutionally impaired court-martial conviction

is sufficient where, as here, the defect is not discovered until after the remedy no longer exists. Unlike Goldsmith, Mr. Denedo did not discover the defect until after the statute of limitations expired. The government has never claimed that he deliberately bypassed a known, available remedy.

Trenkler v. United States, 536 F.3d 85 (1st Cir. 2008), which the government cites (35) with a "*cf.*" signal, is inapposite. It concerns the application of 28 U.S.C. § 2255's savings clause. If anything, the analogy cuts against the government's claim.[14] The saving clause is implicated only if the substitute remedies (for traditional habeas relief) that Congress provided in § 2255's "comprehensive remedial scheme for post-conviction relief" prove to be "inadequate" or "ineffective." *Trenkler*, 536 F.3d at 96-97. In other words, the savings clause analysis looks at the "adequacy and effectiveness" of remedies within, not outside, the § 2255 remedial scheme. Coram nobis is appropriate in Article III courts only if the § 2255 remedy is inadequate or ineffective.

By analogy, coram nobis is appropriate here because the one judicial post-conviction remedy in the UCMJ—a new trial petition—is, as we have already explained, wholly inadequate. Article 73 never afforded Mr. Denedo an opportunity for judicial review of his claim because he pleaded guilty.

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[14] Contrary to the government's suggestion (32), *Trenkler* correctly recognizes that coram nobis is a "gap-filler" and that *Morgan* "made it pellucid that section 2255 does not preempt the entire array of common-law writs authorized under the All Writs Act, 28 U.S.C. § 1651." 536 F.3d at 96-76 (citing *Morgan*, 346 U.S. at 510-11).

The government's characterization of Article 73 as a comprehensive post-conviction remedy or a complete substitute for coram nobis relief is mistaken.[15] It contains no clear expression of congressional intent to provide a complete substitute for any of the prerogative writs. At best, it is an analogue to Fed. R. Crim. P. 33, not § 2255. Enacted just two years before the UCMJ, § 2255 shows how Congress makes itself clear when it intends a statutory remedy to be exclusive or a substitute for extraordinary writs.[16]

Had Mr. Denedo been convicted in district court, he could have sought coram nobis (for which there is no time limit) if he was not in custody. If he was in custody, he could file under § 2255 because the one-year period of limitations would not have started to run until the "date on which the facts supporting the

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[15] "A motion for new trial is historically distinguishable" from coram nobis. George H. Dession, *The New Federal Rules of Criminal Procedure*, 56 YALE L.J. 197, 233 (1947). "Where a defendant enters a plea of guilty under duress or because of fraud or mistake, the remedy by writ of error coram nobis is of peculiar applicability in view of the absence of any other means of relief." Abraham L. Freedman, *The Writ of Error Coram Nobis*, 3 TEMPLE L.Q. 365, 398 (1929). Judge Ryan's suggestion that Mr. Denedo's claim is "nothing more than a petition for a new trial, dressed up as a writ of coram nobis," Pet. 53a & n.8, is therefore incorrect.

[16] *Trenkler* is also factually distinguishable. Unlike Trenkler, Mr. Denedo could not have discovered the facts supporting his claim by the exercise of due diligence until after the completion of direct review and expiration of the deadlines for a new trial petition (even if it were an available, effective option) and claims against the United States. He did not neglect to avail himself of any statutory post-conviction remedy under the UCMJ that would have offered an adequate or effective means of rectifying the error.

claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(4).[17]

3. Appellate military courts may issue writs of error coram nobis

The government points out (36-37) that coram nobis is only available in (1) the jurisdiction and (2) the court in which the conviction is adjudged. The first is true but no help to the government because Mr. Denedo applied within the proper jurisdiction: the military courts. As for the second, because courts-martial are not standing courts, and disappear once their work is done, *Runkle v. United States*, 122 U.S. 543, 555-56 (1887), he applied to the first-level appellate court within the jurisdiction. The worst that can be said is that his petition should have been labeled a petition for a writ of error coram *vobis*. Accepting this part of the government's argument would "exalt nomenclature over substance." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 164 (1984) (quoting *Browder v. Director, Ill. Dept. of Corr'ns*, 434 U.S. 257, 272 (1978) (Blackmun, J., joined by Rehnquist, J., concurring), and cit-

[17] *Morgan*, 346 U.S. at 512-13 (coram nobis appropriate to remedy denial of Sixth Amendment right to the assistance of counsel); *Kwan,* 407 F.3d at 1017-18; *Castro*, 26 F.3d at 559-63; *Couto*, 311 F.3d at 187-88 (counsel's affirmative misrepresentation as to deportation consequences of defendant's guilty plea was objectively unreasonable and prejudicial, and rendered plea involuntary; suggesting that "standards of attorney competence [may] have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable" but not reaching issue).

ing *Schlesinger*, 420 U.S. at 742 n.5). Coram vobis is among the recognized writs, *Loving v. United States*, 62 M.J. 235, 252 (C.A.A.F. 2005) (petition submitted to superior court is writ of error coram vobis); *e.g., Thornton v. Bruton*, 18 M.J. 412 (C.M.A. 1984) (mem.), and a proper vehicle for seeking post-conviction relief from an appellate court such as the Navy Court or the Court of Appeals. The substance of the writ governs, not the label. *E.g., Loving,* 62 M.J. at 252 & n.108, citing 2 STEVEN CHILDRESS & MARTHA DAVIS, FEDERAL STANDARDS OF REVIEW § 13.01, at 13-8.

The government's claim (37) that the military justice system is ill-suited to coram nobis relief is equally unavailing. The post-conviction proceedings outlined in the decision below, Pet. 32a, are no different from post-trial proceedings the appellate military courts have been conducting since the 1960s. *See DuBay, supra*. Those courts have devised "a variety of procedures to ensure that a military accused's rights are fully protected." *United States v. Murphy*, 50 M.J. 4, 5-6 (C.A.A.F. 1998) (citing, *e.g.*, *United States v. Henry*, 42 M.J. 231, 238 (C.A.A.F. 1995) (remanding for consideration of affidavits); *DuBay* (evidentiary hearing)). The government criticizes (39) these post-conviction procedures as "unwieldy" and "imperfect," and no one would claim that they are perfect. But that is no basis for leaving without a remedy those individuals such as Mr. Denedo who can turn nowhere else. Doing so would not foster public confidence in the administration of justice in the Armed Forces.

The government's additional claim (39) that the decision below will divert military resources is not only unfounded but irrelevant to jurisdiction. Even though coram nobis has been available from the military courts for decades, *see Frischholz*; *Del Prado*, such cases remain a minor part of the workload of the courts of criminal appeals and the Court of Appeals. In the last 10 years for which data are available, the Court of Appeals received only 10 coram nobis petitions.[18] During the same decade, there were also 176 writ appeals. The court granted relief or remanded in only a handful. Even if a substantial portion of the writ appeals sought coram nobis relief, they would still not unduly burden the military in general or the military justice system in particular. The vast majority of coram nobis cases are dismissed in the briefest of orders. *See* 59 YALE L.J. at 792 (those who oppose coram nobis relief typically assert that the courts will be "swamped with a small avalanche of motions . . . But the spectre of judicial overwork often fails to materialize, and even if it does, it has no bearing on the need for expunging unjust convictions") (citing *Potter v. Dowd*, 146 F.2d 244, 249 (7th Cir. 1944)).

To the extent that the administration of any criminal justice system entails effort or expense democratic society has long since determined that the game is worth the candle. If cost alone were a legitimate reason not to entertain coram nobis petitions in the military justice system there would also be no such thing as rehearings ordered on direct review,

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[18] The court's annual reports are available at http://www.armfor.uscourts.gov/Annual.htm (last visited Feb. 8, 2009).

habeas petitions, new trial petitions, or any other post-conviction review. "Compliance with any judicial process requires some incremental expenditure of resources." *Boumediene v. Bush*, 128 S. Ct. 2229, 2261 (2008) (finding "no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims").

Nor is there any merit to the government's claim (39-40) that defense counsel "would likely be" required at government expense and contribute to a flood of "frivolous petitions." A former servicemember has no constitutional right to post-conviction military defense counsel to mount a collateral attack, *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), and while military appellate defense counsel happen to have been made available to Mr. Denedo, that was a matter of grace, as there is no right to military counsel on collateral review. Art. 70(e), UCMJ, 10 U.S.C. § 870; *United States v. Foxworth*, 2 M.J. 508, 509 (A.C.M.R. 1976) (no right to military counsel for post-final judgment coram nobis).[19]

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[19] The government has sensibly abandoned its earlier claims, Pet. 23-24, that the military justice system lacks power to compel testimony by discharged coram nobis petitioners and that even allowing punitively discharged personnel to enter a military installation for the purpose of appearing at a coram nobis hearing would harm the government. *See generally* Resp. Brief in Opposition 13-14.

C. *Article 76 is no bar to Mr. Denedo's coram nobis petition*

The Court of Appeals' interpretation of Article 76 to permit collateral review is supported by precedent. It is consistent with the principle that statutes should not be construed to preclude review of constitutional claims absent a "heightened showing" of congressional intent to do so. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Schlesinger*, 420 U.S. at 753; *see also Johnson v. Robison*, 415 U.S. 361, 367 (1974). That standard is required "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12 (1986). The government has not even attempted to make that "heightened showing."

Schlesinger, 420 U.S. at 749, teaches that Article 76 is a prudential restraint, not a jurisdictional one. The Court squarely rejected a government argument that it is a jurisdiction-stripping provision that precludes all forms of collateral relief in all forums with the sole exception of writs of habeas corpus in the Article III courts. *Id.* at 744-53.

Schlesinger observed that, long before Article 76 or its predecessor—Article of War ("AW") 50(h)—were enacted, "settled principles of the law of judgments have been held from the start fully applicable to court-martial determinations." *Id.* at 747. The first such principle is that military court judgments, "like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have res

judicata effect and preclude further litigation of the merits." *Id.* at 746 (citing 1B JAMES W. MOORE, FEDERAL PRACTICE 0.405[4.-1] 634-37 (2d ed. 1974)). The second principle is that void judgments, although final for purposes of direct review and res judicata, are subject to collateral attack in an appropriate forum—*i.e.*, a court with subject matter jurisdiction over the suit. *Id.* at 746-47 (citing Restatement of Judgments § 11 (1942); FLEMING JAMES, CIVIL PROCEDURE § 11.5 (1965); *compare Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965), *with Davies v. Clifford*, 393 F.2d 496 (1st Cir. 1968)). A judgment is void, and therefore subject to collateral relief, "because of lack of jurisdiction or some other equally fundamental defect." *Schlesinger*, 420 U.S. at 747; *Morgan*, 346 U.S. at 509 n.15, 512-13; *Waley*, 316 U.S. at 104-05; *Johnson v. Zerbst*, 304 U.S. at 468. *Schlesinger* further noted that court-martial convictions have historically been subject to various forms of collateral attack. 420 U.S. at 747-48 (citing *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806); *Dynes v. Hoover*, 16 U.S. (20 How.) 65 (1857); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Runkle*).

Against that backdrop, the Court examined the language of Article 76 and concluded that its "clear purport" is that of a basic finality rule which does nothing more than "define[] the point at which military court judgments become final and requires that they be given res judicata effect." *Schlesinger*, 420 U.S. at 749, 752; *see also Gusik v. Schilder*, 340 U.S. 128 (1950) (construing identical finality language in AW 53 as merely defining terminal point for direct review within military appellate courts); *Burns v. Wilson*, 346 U.S. 844 (1953) (Frankfurter, J., concur-

ring in denial of rehearing) (UCMJ's legislative history "strongly suggests that it was precisely in the realm of collateral judicial attack on courts-martial that the concept of 'finality' was intended not to operate").

Schlesinger's construction of Article 76 is supported by the text. First, by qualifying the term "appellate review" with the words "records of trial" and "provided by this chapter," it plainly refers to the finality of ordinary *direct* review—not extraordinary *collateral* review. Direct review of "records of trial"—as opposed to extrinsic material—is the only type of "appellate review . . . provided by" (as opposed to permitted by) "this chapter." Second, it uses traditional final judgment and res judicata terminology—*i.e.*, "final and conclusive" and "binding upon all . . . courts . . . of the United States."[20] Third, it states that there are only three exceptions to the binding effect of military court judgments: new trial petitions (Article 73); clemency from the service secretary (Article 74); and presidential authority. Each of these is, by its very nature, an exception to Article 76's binding effect, as each permits, to a varying degree, the very thing res judicata would otherwise prohibit: relitigation of the facts underlying the conviction and issues that were (or could have been) adjudicated on direct review. A new trial petition, for example, seeks to re-litigate the findings and sentence. It

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[20] *E.g.*, *Adams v. Preston*, 63 U.S. 473, 479 (1859) ("judgments . . . are final and conclusive adjudications of the subject matter of this suit, and form res judicata against complainant"); *Forsyth v. City of Hammond*, 166 U.S. 506, 520 (1897) ("final adjudication" is "binding and conclusive, upon the principle of res judicata").

would be a meaningless exception if the original trial were to remain binding. Likewise, clemency involves the power to modify the sentence to the benefit of the accused. Even if Article 76 did not expressly refer to Articles 73 and 74 and presidential authority, they would nonetheless operate as res judicata exceptions.

Based on Article 76's text, *Schlesinger* construed it to mean simply that final judgments of military courts, like those of any court of competent jurisdiction not subject to further *direct* review for errors of fact or law, have res judicata effect and preclude further litigation of the merits. *Schlesinger*, 420 U.S. at 746-53.[21] At the same time, the Court made clear that "there is no necessary inconsistency between [Article 76's finality rule] and the standard rule that void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject-matter jurisdiction." *Id.* at 749; Restatement of Judgments § 11 (1942).

Moreover, as Chief Judge Effron explained, Pet. 9a-10a, both *Schlesinger*, 420 U.S. at 753 n.26, and *Noyd v. Bond,* 395 U.S. 683, 695 n.7 (1969), referred with approval to the Court of Military Appeals' deci-

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[21] The legislative history of Article 76 is consistent with this interpretation. It was derived from AW 50(h). S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949); H. Rep. No. 491, 81st Cong., 1st Sess. 35 (1949). The legislative history of that provision, in turn, indicates that it was intended to codify and make "explicit" what the law and practice had been for many years—*i.e.*, final judgments of military courts had res judicata effect. H. Rep. No. 1034, 80th Cong., 1st Sess. 7, 12 (1947); *Hearings Before H. Comm. on Armed Services on H.R. 2575*, 80th Cong., 1st Sess. 2118 (1947) (testimony of Brig. Gen. Hubert D. Hoover, Ass't Judge Advocate General of the Army).

sion in *Frischholz,* the landmark 1966 case in which that court first squarely held that it has jurisdiction to grant coram nobis relief post-finality.

The government's effort to discount *Schlesinger*'s reliance on *Frischholz* is unavailing. It contends that *Schlesinger* cites that case only for what the government characterizes as the "more limited" proposition that Article 76 "'does not insulate a conviction from subsequent attack in an appropriate forum.'" It is clear, however, that *Schlesinger* cites *Frischholz* with approval with respect to its full import. The language the Court chose to quote represents *Frischholz*'s fundamental proposition: that military convictions are subject to collateral attack in *an appropriate forum*:

> The Court of Military Appeals stated that Art 76 "does not insulate a conviction from subsequent attack in *an appropriate forum*. At best it provides finality only as to interpretations of military law by this Court. . . . It has never been held to bar review of a court-martial, when fundamental questions of jurisdiction are involved."

Schlesinger, 420 U.S. at 753 n.26 (quoting *Frischholz*, 16 U.S.C.M.A. at 151, 36 C.M.R. at 307) (emphasis added).[22]

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[22] The government's reading of *Schlesinger* imputes to the Court a superficial understanding of *Frischholz*. The Court was plainly aware of the complexity of that case's implications. Years earlier, in *Noyd*, 395 U.S. at 695 n.7, when it first cited *Frischholz* with approval, it was careful to note, in light of *United States v. Bevilacqua,* 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968), that "[a] different question would, *of course*, arise in a case which the Court of Military Appeals is not authorized to

The government claims (19) that because Article 76 is "subject only to the three explicitly enumerated exceptions," it must be read to preclude any form of collateral relief. This reflects a basic misunderstanding of the law of judgments. There is no reason to refer to collateral remedies in Article 76 because the general principle that a final judgment is binding carries with it the standard qualification that void judgments may be collaterally impeached. *Schlesinger*, 420 U.S. at 752-53.

If Congress had intended that Article 76 alter the settled law of judgments it would have said so expressly. Moreover, as *Schlesinger* pointed out, "nothing in Art. 76 distinguishes between habeas corpus and other remedies also consistent with well-established rules governing collateral attack." 420 U.S. at 751. The language of Article 76 is "singularly inapt" to support such a distinction. *Id.* Given that Article 76, by its plain meaning, has the same effect on "all . . . courts," 10 U.S.C. § 876, its language is equally "inapt" to preclude Article I appellate military courts from entertaining collateral attacks on void judgments.[23]

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review under the governing statutes" (emphasis added). (When such a case did arise, the Court of Military Appeals properly denied relief, noting that "[r]esort to extraordinary remedies cannot serve to enlarge our power to review cases, but only to aid us in the exercise of the authority we already have." *United States v. Snyder*, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969).

[23] The government's Article 76 argument suffers from the obvious defect that, if it were valid, it would mean that neither the Article I Court of Federal Claims, 28 U.S.C. § 171(a), nor the district courts, could collaterally review courts-martial, even though this is settled law. Faced with this inconvenient aspect of its position, the government improbably seeks (20-21)

The government cites (18, 37) *Witham v. United States*, 355 F.3d 501, 505 (6th Cir. 2004), for the proposition that "[n]either the Uniform Code of Military Justice nor the Manual for Courts-Martial provides for collateral review within the military courts." *Witham* relies entirely on *United States v. Murphy*, and *Murphy* does not stand for that proposition. Rather, *Murphy* merely pointed out that, "[u]nlike the practice in the United States Courts of Appeals and District Courts, neither the UCMJ nor the Manual for Courts-Martial, United States, 1984, provides procedures for collateral, post-conviction attacks on guilty verdicts." *Murphy*, 50 M.J. at 5 (citing § 2255). The absence of statutorily articulated procedures, however, does not mean that appellate military courts have no authority to create them or hear post-conviction claims of constitutional or fundamental error. To the contrary, the All Writs Act plainly applies to the Article I appellate military courts, and since the 1960s it has been settled law that those courts may grant extraordinary writs. *Noyd*, 395 U.S. at 695 n.7.

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to impose a different meaning on Article 76's finality rule depending on whether collateral relief is sought in the Article III courts or in the appellate military courts. Nothing in the statutory text supports the distinction the government would have the Court make. Article 76 cannot be jurisdictional yet still permit the equitable exceptions the government admits exist. *Bowles*, 127 S. Ct. at 2366.

D. *The decision below is consistent with precedent and the government's own longstanding view*

The decision below is well-reasoned and supported by settled precedent. It reflects a view the government itself has advanced in litigation and before Congress. Since the case presents only a question of statutory interpretation, adherence to stare decisis is appropriate because Congress is free to change the UCMJ at any time.

1. The government's position in the courts

The position the government has taken here is diametrically opposed to the one it advanced in *Frischholz v. Sec'y of the Air Force*, Civil No. 1915-64 (D.D.C. Apr. 7, 1965); *see Frischholz*, 16 U.S.C.M.A. at 151, 36 C.M.R. at 307. Frischholz's conviction had become final under Article 76 and he was dismissed from the service. Five years later, when he sought coram nobis from the district court, the government moved to dismiss, arguing that the "petition is one peculiarly within the jurisdiction of the Court of Military Appeals." Def. Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Gov't Frischholz Mot") 7:

> The Court of Military Appeals is a court established by Act of Congress, 10 U.S.C. § 867, and it should necessarily follow that that Court should have the same authority under 28 U.S.C.A. 1651(a) that the Supreme Court in the *Morgan* case recognized in civil courts in

> criminal cases arising and heard in United States District Courts.
>
> * * *
>
> By analogy, the Supreme Court has recognized in *Hysler v. Florida*, 315 U.S. 411, 416, 417 (1942) that each State is free to devise its own way of securing justice in treating writs of error coram nobis. Surely the Court's language (p. 417) is broad enough to apply the authority of the Court of Military Appeals so that it too may treat the writ of error coram nobis in its own way and in its own military jurisdiction.

Gov't Frischholz Mot. 4-7.

In the alternative, the government sought dismissal because Frischholz deliberately failed to seek a new trial under Article 73:

> Since Congress has provided machinery and procedure within the military so that one convicted by courts-martial can collaterally attack his court-martial, this is persuasive evidence that any collateral attack thereon should be taken within the military structure.

Id. 12-13.

The district court dismissed, ruling that Frischholz should seek collateral review within the military justice system in the first instance. *Frischholz*, 16 U.S.C.M.A. at 151, 36 C.M.R. at 307. When he then sought coram nobis from the Court of Military Appeals, the government reversed course and asserted that that court had no jurisdiction under Articles 67 and 76, UCMJ, 10 U.S.C. §§ 867, 876. *See id.* at 151, 36 C.M.R. at 307. The court held that

it had jurisdiction, but denied coram nobis relief on the merits. *Id.* at 152-53, 36 C.M.R. at 308-09.

In 1972, the government conceded partial relief in an Army case in which a petitioner had sought post-finality coram nobis from the Court of Military Appeals. *Seelke*, 21 U.S.C.M.A. at 300, 45 C.M.R. at 74.

In a 1990 Tucker Act case, the government attempted to persuade the Federal Circuit that Congress intended the appellate military courts—not the Claims Court—to conduct post-finality collateral review of courts-martial. Brief for Appellee 8-10, *Matias v. United States*, 923 F.2d 821, 825 (Fed. Cir. 1990). Invoking the canon that statutes should be interpreted to avoid unreasonable results, it argued that "[i]t is illogical to assume that Congress would have granted jurisdiction to two Article I civil courts"—the Court of Military Appeals and the Claims Court—"for the purpose of determining the legality of court-martial proceedings." *Id.* at 11. The Federal Circuit rejected the government's argument that § 1259, *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989), and other developments "undermine[d] the rationale for collateral attack on court-martial convictions in the Claims Court," but affirmed that court's conclusion that the "military gave full and fair consideration to each of Matias' claims in proceedings that satisfied the requirements of due process of law." *Matias*, 923 F.2d at 826.

Little more than a year ago, in *Tatum v. United States*, Civil No. 06-2307-RDB, 2007 WL 2316275 (D. Md. Aug. 7, 2007), the government argued that

> Tatum failed to exhaust his available military remedies. Specifically, Tatum may re-

> quest immediate relief under 28 U.S.C. § 1651 (All Writs) through either the Navy Marine Corps Court of Criminal Appeals or the United States Court of Appeals for the Armed Forces (CAAF). The applicability of this remedy is particularly evident in this case since those courts have the authority to review and grant relief even in cases where the servicemember has served a period of confinement and been discharged. *See* 10 U.S.C. §§ 866(c)-(d), 867(a)-(d); *Thompson v. United States*, 60 M.J. 880 (NMCCA 2005).

Def. Motion to Dismiss, or, in the Alternative, for Summary Judgment 7. The court dismissed Tatum's complaint on the ground that he had failed to exhaust by seeking coram nobis relief from the military courts. 2007 WL 2316275 at *4, *6-*7 (citing *Thompson*, 60 M.J. at 883, for proposition that appellate military courts have jurisdiction to grant coram nobis relief).

2. The government's position in the legislative process and what Congress knew

Congress was not in the dark about *Frischholz* or the fact that appellate military courts have been entertaining post-finality collateral attacks for many years. While that case was pending, Judge Ferguson of the Court of Military Appeals described it (albeit not by name) in testimony, including the fact that the government had switched positions on the jurisdictional issue. *Bills to Improve the Administration of Justice in the Armed Services, Hearings on S. 745 through S. 760 Before the Subcomm. on Constitu-*

tional Rights, Sen. Judiciary Comm., and Spec. Subcomm., Sen. Armed Services Comm., 89th Cong., 2d Sess. 303 (1966).[24] The committees' subsequent summary of military justice identified the "Writ of Error Coram Nobis (Military or Civilian)" as one of several remedies under the heading "Collateral Attack on Court-Martial Action." *Id.* at 662, 667.

In 1968—only two years after *Frischholz* and having heard from Judge Ferguson—Congress reinforced the principle that appellate military courts have All Writs Act power by renaming the Court of Military

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[24] Judge Ferguson testified:

> . . . I wish to call the committee's attention to a controversy which has swirled about the Court of Military Appeals almost since its inception. That is the question whether it, as an appellate court, has the authority to entertain a writ of error in the nature of coram nobis and correct certain fundamental injustices in a court-martial which either could not be or were not found by it in the normal course of review. The United States has consistently denied we had such authority, except for a recent instance in which the accused had sought such a writ from the local Federal courts. Then, the Government urged the case properly belonged to us on a similar writ. The local judge so ruled, in effect, but when the case came before us, the Government switched its position and argued we did not have the authority to entertain it. As this case is still sub judice, I will not comment further on it, but it indicates a problem which should be resolved and I think it could be most suitably ended by an additional amendment to article 66 of the code to provide expressly that: "The Court of Military Appeals shall have power to entertain a writ of error in the nature of coram nobis in all court-martial cases to which its appellate jurisdiction originally extended and grant such relief to the petitioner as it may deem required.

Appeals as the "*United States* Court of Military Appeals," Pub. L. No. 90-340, 82 Stat. 178 (1968), and the "Boards of Review" as "Courts of Military Review." Pub. L. No. 90-632, 82 Stat. 1335 (1968). The House report explained:

> There has been some claim that the court, having been put under the Department of Defense for administrative purposes [*see* Art. 141, 10 U.S.C. § 941], is in effect an administrative agency. If it had such status, it would not be able to question any of the provisions of the Manual for Courts-Martial since the manual had been promulgated by Presidential order. The bill makes clear that the Court of Military Appeals is a court and does have the power to question any provision of the manual or any executive regulation or action as freely as though it were a court constituted under Article III of the Constitution.

H. Rep. No. 1480, 90th Cong., 2d Sess. 2 (1968).

Powerful confirmation that the appellate military courts possess All Writs Act powers—and specifically the power to grant post-finality coram nobis relief—came in 1982 from the Department of Defense. For some time there had been a question as to whether the Boards for Correction of Military Records had the power to review and modify the findings and sentences of courts-martial. The 1966 Senate committees' summary of military justice collateral remedies, *see* p. 49 *supra*, had noted the issue. *See also Correction of Military Records*, 41 Op. Att'y Gen. 49 (1949) (correction boards can correct error or remove injustice in court-martial records despite AW 50(h)

finality provision). The Department therefore proposed legislation that would, in addition to enacting § 1259, make clear that those boards lack power to reverse court-martial findings and sentences and limit their authority over sentences to the provision of clemency. The letter of transmittal indicates that the drafters believed post-finality review is available within the military justice system. Letter from William H. Taft IV, Gen. Counsel, Dep't of Defense, to Speaker Thomas P. O'Neill, Jr., Aug. 12, 1982, *supra*, at 175.

Mr. Taft, the Department's General Counsel, elaborated on this in testimony before the Senate Armed Services Committee. He explained that eliminating correction board review would not leave litigants without an avenue for post-finality collateral relief. Describing the UCMJ as a "comprehensive system of appellate review and post-conviction relief," he testified that post-finality collateral review, *including coram nobis*, is available from the appellate military courts:

> The amendments will underscore the stature of the Court of Military Appeals and the Courts of Military Review. It would be inconsistent with the dignity and respect that these courts have earned for the military justice system to suggest that their decisions on issues of law could be reversed by an administrative board.
>
> The proposed legislation would make it clear that the BCMRs [correction boards] and DRBs [discharge review boards] have no authority to review the proceedings, findings, or

> sentences of courts-martial. This will have the effect of channeling all appellate proceedings and claims for post-conviction relief into the avenues established for such actions by Congress in the UCMJ.
>
> Pre-UCMJ cases may be reviewed on issues of law by The Judge Advocate General under Article 69; *post-UCMJ cases that were subject to Court of Military Review jurisdiction may be reviewed by the Courts of Military Review or the Court of Military Appeals on writs of coram nobis;* post-UCMJ cases that were not subject to UCMJ jurisdiction may be reviewed by The Judge Advocate General under Article 69. This will not only eliminate unnecessary duplication of procedures, it will also ensure that post-conviction challenges by the accused will be heard in a judicial forum.[25]

Among the remedies that would remain available under the proposed legislation was *precisely the one Mr. Denedo invoked*. Moreover, elimination of the administrative remedies was premised on the fact that coram nobis and other collateral remedies remained available from the appellate military courts.

The Senate report expressly adopted the Department's view:

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[25] *The Military Justice Act of 1982, Hearings on S. 2521 Before the Subcomm. on Manpower & Personnel, Sen. Comm. on Armed Services,* 97th Cong., 2d Sess. 36 (1982) (prepared statement of William H. Taft, IV, Gen. Counsel, Dep't of Defense) (emphasis added).

> The proposed legislation would make it clear that with respect to cases tried after May 4, 1950, the BCMRs and DRBs have no authority to modify, as a matter of law, findings and sentences of courts-martial. This will have the effect of channeling all appellate proceedings and claims for post-conviction relief into the judicial forums established for such actions by Congress in the UCMJ.

S. Rep. No. 98-53, 98th Cong., 1st Sess. 36 (1983).

Congress passed the measure and President Reagan signed it. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

Having cited Mr. Taft's statement for what it implies on a different point (26 n.5), the government cannot be heard to dispute the position he set forth directly on the precise issue presented here: the availability of post-finality coram nobis relief.

3. Court and Judge Advocates General rule-making on coram nobis

Both the Court of Appeals and the Judge Advocates General recognize that the appellate military courts can grant writs of error coram nobis without a time limit.

The Court of Appeals has a Rules Advisory Committee. In 1994, the committee, which includes representatives from the services, Department of Justice, law schools, and private practice, *see* C.A.A.F.R. 45(a), proposed a change to the court's Rule 4(b), concerning the court's jurisdiction to entertain extraor-

dinary writ petitions. The change made clear that, while the court has original writ jurisdiction, practitioners should, absent good cause, first seek relief in the intermediate court. *See also* R.C.M. 1204 (Discussion). The committee also proposed a change to Rule 19, which prescribes a time limit for petitions for extraordinary relief. That change deleted, for coram nobis, the 20-day limit that had applied to extraordinary writ petitions other than those seeking habeas corpus. C.M.A.R. 19(d), 38 M.J. LXXIII, LXXVII (1994).

The committee noted "that only petitions for writ of habeas corpus are expressly exempted from the 20-day time limit established by Rule 19(d)," but suggested that "the failure also to exempt petitions for writ of *error coram nobis* may be due to an oversight by the drafters of Rule 19." 60 FED. REG. 4893 (1995). The committee explained that

> [t]he All Writs Act, 28 USC 1651(a), which is the basis for the Court's extraordinary relief jurisdiction, establishes no fixed time limit for applications for writs of *error coram nobis*. *See United States v. Morgan*, 346 U.S. 502 (1954) (writ available after sentence already served when the conviction was sought to be used to enhance sentence on a later conviction).
>
> When Rule 19 was drafted, the Court of Appeals for the Armed Forces had not previously suggested any time limit for the filing of a petition for writ of error coram nobis. *See Del Prado v. United States*, 23 USCMA 132,

48 CMR 748, 749 (1974) (citing *United States v. Morgan*, *supra*).

The committee voted unanimously for the proposed change to Rule 4. The sole dissenter with respect to the proposed change to Rule 19 was from the Air Force. The Court of Appeals published the proposed changes, 60 FED. REG. 4893 (1995), and ultimately adopted them. 43 M.J. CLXXVII (1995).

Similarly, a committee composed of representatives of the service courts proposed uniform rules for the service courts. These were "submitted to the respective Judge Advocate Generals for approval and promulgation pursuant to Article 66(f) of the [UCMJ]." 60 FED. REG. 64031 (1995). Those rules provide that a service court "may, in its discretion, entertain . . . writs of error coram nobis" without time limit. 32 C.F.R. §§ 150.2(b), 150.20.[26]

4. Stare decisis and congressional ratification

Stare decisis and congressional ratification militate against the government's position.

"Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation,

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[26] The Air Force Court's local rules also provide for coram nobis but, uniquely among the service courts, purport to impose a 20-day limit. A.F.C.C.A.R. 2(b), 20.1(a). We believe that limit is unlawful. *See Morgan*; *United States v. Gilley*, 59 M.J. 245, 247 (C.A.A.F. 2004) (invalidating Air Force Court's local rule requiring counsel to submit briefs in a remanded case within shorter period than prescribed by service courts' uniform rules).

the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Congress has known for decades that the appellate military courts interpret their statutes to permit collateral review, including coram nobis petitions. At worst, Congress has acquiesced in their interpretation, *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 752 (2008), and at best, has reinforced it. When Congress passed the Military Justice Act of 1983—with Mr. Taft's testimony in mind—it "emphasize[] that it does not intend to displace the Court of Military Appeals as the primary interpreter of military law" and that that court would remain "the principle source of authoritative interpretations of the UCMJ." S. Rep. No. 98-53, 98th Cong., 1st Sess. 10-11 (1983).

Congress is presumed to know what the courts decide. But there is no need to rely on a presumption in connection with congressional awareness of the appellate military courts' exercise of All Writs Act authority. Judge Ferguson and Mr. Taft told them about it. In addition, Congress has required the submission of annual reports. Art. 146, UCMJ, 10 U.S.C. § 946. Those reports record the extraordinary writ activity of the Court of Appeals. *See*, *e.g.*, 38 M.J. CXI, CXXXIII (1991-92).

CONCLUSION

For the foregoing reasons, the petition should be dismissed as improvidently granted. Alternatively, the decision below should be affirmed.

Respectfully submitted.

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